(5) (4)

Nos. 03-1521, 03-1532

AUG 13 2004

In The Supreme Court of the United States

VISA U.S.A., INC.,

Petitioner,

v.

UNITED STATES

MASTERCARD INTERNATIONAL, INC.,

Petitioner,

v.

UNITED STATES

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR THE INDEPENDENT COMMUNITY BANKERS OF AMERICA, THE SMALL BUSINESS SURVIVAL COMMITTEE, AND CARD SERVICES FOR CREDIT UNIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

DREW S. DAYS, III
Counsel of Record
W. STEPHEN SMITH
BETH S. BRINKMANN
JONATHAN S. GOWDY
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-1500

Attorneys for *Amici Curiae*

August 13, 2004

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a joint venture's loyalty rule, which restricts partners to the joint venture from teaming with outside rivals to compete against it, is presumptively unlawful under the antitrust laws, or may violate the antitrust laws even when the rule does not prevent rivals from distributing their products to consumers and does not result in consumer harm.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

REVIEW IS WARRANTED BECAUSE THE COURT OF APPEALS' OPINION CONFLICTS WITH ANTITRUST RULINGS BY THIS COURT AND SEVERAL OTHER CIRCUITS REGARDING ANCILLARY RESTRAINTS AND WILL DETER INVESTMENT IN PROCOMPETITIVE JOINT VENTURES 4

A. Joint Ventures Are An Increasingly Important Means Of Developing And Delivering New Products And Services In Today's Economy 5

B. The Court Of Appeals' Ruling Is Inconsistent With This Court's Precedents And Conflicts With The Decisions Of Several Other Circuits Regarding The Lawfulness Of Ancillary Restraints In Joint Ventures 8

1. The court of appeals' ruling that joint venture loyalty rules are not presumptively lawful is inconsistent with the Court's *BMI* decision and contrary to rulings of the Seventh, Tenth, and D.C. Circuits 8

2. The court of appeals' equating of injury to rivals with injury to competition is contrary to the longstanding rule of this Court 14

TABLE OF CONTENTS – Continued

Page

C. The Court Of Appeals' Ruling Will Deter Investment In Procompetitive Joint Ventures And Diminish Competition, In Contravention Of The Purpose Of The Antitrust Laws 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982) 10

Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990) 3, 15

Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1 (1979) ..... *passim*

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993) 2, 4

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) 14

Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986) 15

Continental T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) 18, 19

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) 4, 8, 10, 15, 18

Mallan v. May, 152 Eng. Rep. 967 (Ex. D. 1843) 19

Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984) 18

National Collegiate Athletic Association v. Board of Regents, 468 U.S. 85 (1984) 11, 12, 13, 14

Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985) 10, 12, 13

Polk Bros., Inc. v. Forest City Enterprises, Inc., 776 F.2d 185 (7th Cir. 1985) ..... *passim*

Reiter v. Sonotone Corp., 442 U.S. 330 (1979) 15

TABLE OF AUTHORITIES – Continued

Page

Roland Machinery Co. v. Dresser Indus., Inc., 749 F.2d 380 (7th Cir. 1984) 16

Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987) ..... *passim*

SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958 (10th Cir. 1994) 12

United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899) ..... *passim*

Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, 124 S. Ct. 872 (2004) 4, 19

LEGISLATIVE MATERIALS

S. Rep. 103-51 (1993) 7

U.S. Dep't of Justice & Federal Trade Comm'n, *Antitrust Guidelines for Collaborations Among Competitors* (2000) 6, 7

MISCELLANEOUS

James Bamford et al., *Launching a World-Class Joint Venture*, Harv. Bus. Rev., Feb. 2004, at 9 5

Howard H. Chang et al., *Some Economic Principles for Guiding Antitrust Policy Towards Joint Ventures*, 1998 Colum. Bus. L. Rev. 223 (1998) 6, 7

TABLE OF AUTHORITIES – Continued

Page

Pete Collins, *Joint Ventures Providing High Traction for America's Fastest Growing Companies and the Economy*, PricewaterhouseCoopers Trendsetter Barometer Survey, Nov. 6, 2000 *available at* http://www.barometersurveys.com/production/BarSurv.nsf/vwResources/Pr_PDF_Files/$file/tb001106.pdf (last visited Aug. 12, 2004) 8

David Ernst, *Give Alliances Their Due*, McKinsey Quarterly, June 22, 2002, at 4 5

Letter to the Editor from Kenneth Guenther, President and Executive Director, ICBA, American Banker, Oct. 26, 2001, at 11 ..... 17, 20

Gary Hamel et al., *Collaborate with Your Competitors – and Win,* Harv. Bus. Rev., Jan.-Feb. 1989, at 133 7

XI Herbert Hovenkamp, *Antitrust Law* (1998) 2, 13

Joseph Kattan, *Allocative Efficiency and the Rewards of Innovation,* 61 Antitrust L.J. 937 (1993) 6, 7, 18

Namgyoo K. Park et al., *A Resource-based View of Strategic Alliances and Firm Value in the Electronic Marketplace*, J. of Mgmt., Feb. 2004, at 7 6

Thomas Piraino, Jr., *Beyond Per Se, Rule of Reason or Merger Analysis: A New Antitrust Standard for Joint Ventures,* 76 Minn. L. Rev. 1 (1991) 6

Thomas Piraino, Jr., *Reconciling Competition and Cooperation: A New Antitrust Standard For Joint Ventures*, 35 Wm. & Mary L. Rev. 871 (1994) 6

Robert Pitofsky, *A Framework for Antitrust Analysis of Joint Ventures*, 74 Geo. L.J. 1605 (1986) 6

TABLE OF AUTHORITIES – Continued

Page

Small Banks Fear Visa Suit Hurts Them The Most, Bank Network News, May 12, 1999, LEXIS, News Library, ARCNWS File 17

INTEREST OF *AMICI CURIAE*[1]

The Independent Community Bankers of America (ICBA) represents the largest constituency of community banks in the nation, and is dedicated exclusively to protecting the interests of the community banking industry. Community banks serve the nation's consumers, farmers, and small businesses with financial services that support their local communities. The ICBA's membership encompasses approximately 5,000 banks in 17,000 locations across the country, with assets ranging in size from $2 million to $7 billion. Many ICBA member banks belong to both Visa and MasterCard.

The Small Business Survival Committee (SBSC) is a nonpartisan, nonprofit small business advocacy group with 70,000 members across the nation. The SBSC works to promote policies and legislation that maintain a favorable environment for small business growth, entrepreneurship and competitive markets.

Card Services for Credit Unions (CSCU) has more than 2,600 credit union members representing more than one half of the nation's 5,000 credit unions that issue credit cards. CSCU's members represent more than 14.5 million cardholders. Accordingly, CSCU is the largest credit union card processing organization in the country. Many CSCU members belong to both Visa and MasterCard.

SUMMARY OF ARGUMENT

Over the last 30 years, this Court's antitrust jurisprudence has focused on ensuring that the borders of antitrust laws are drawn clearly, so that the laws do not deter

---

[1] Letters from all parties consenting to the filing of this brief are being filed with the Clerk of this Court along with this brief. No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, or their counsel, made a monetary contribution to the preparation or submission of this brief.

business conduct that benefits consumers. *E.g., Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 221 (1993). The court of appeals' decision blurs these boundaries. It adopts antitrust rules that ignore the teachings of this Court and other courts of appeals and, by doing so, creates marked uncertainty for any company that participates in a joint venture or strategic alliance doing business in the Second Circuit. This uncertainty, unless resolved by this Court, will deter companies from cooperating to create new ventures, products and services that enhance consumer welfare.

A. Joint ventures and strategic alliances are an important source of economic growth. They are, quite simply, arrangements in which two or more companies work together to produce new products or achieve other economic efficiencies that none of the companies could achieve alone. *E.g., Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 21 (1979) (*BMI*). Conservative estimates suggest that more than 5,000 joint ventures were launched worldwide during the last five years, and that the 100 largest ventures have combined annual revenues of more than $350 billion.

B. When companies form new joint ventures or alliances, they not only contribute the assets and resources that will be devoted to the venture's business activity, but they also agree upon a set of rules that will govern their business relationships. Certain of these rules are called "ancillary restraints" in antitrust parlance, because they impose restrictions on the competitive behavior of the participants in the venture that are ancillary to the achievement of the venture's business objective. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 281-282 (6th Cir. 1898) (Taft, J.), *aff'd*, 175 U.S. 211 (1899).

1. Since its decision in *BMI*, this Court and the lower courts have consistently recognized that ancillary restraints carry "a presumption of lawfulness." XI Hovenkamp, *Antitrust Law* ¶ 1904 (1998). The court of appeals ignored these teachings, however, and concluded that an

ancillary restraint in which each joint venture partner "agree[s] not to compete with the others in a manner which the consortium considers harmful to its combined interests," is "[f]ar from being 'presumptively legal.'" Visa Pet. App. 20a.[2] On the contrary, the court of appeals held, it is an "exemplar[] of the type of anticompetitive behavior prohibited by the Sherman Act." *Ibid.* This holding casts a long shadow over the lawfulness of the most common, and arguably most important, form of ancillary restraint in joint ventures – the requirement that joint venture partners be loyal to each other.

2. The court of appeals compounded this error by holding that a joint venture's loyalty rule can violate the antitrust laws even when it is undisputed that the joint venture faces strong rivals and that competition in issuing cards to consumers is "robust." Visa Pet. App. 16a, 19a. In the court's view, harm to competition can be established by the fact that a competitor cannot team with a joint venture partner to offer products that will compete with the venture's offerings. But harm suffered by competitors is simply not sufficient to support a cause of action under the antitrust laws; those laws require harm to the competitive process because that, in turn, harms consumer welfare. *E.g.*, *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 337-338 (1990). The court of appeals' contrary decision to open the courthouse door to claims that ancillary restraints violate the antitrust laws whenever they limit a competitor's ability to compete against a joint venture to which it belongs should not be left unreviewed.

The court of appeals' finding of purported harm to competition in the provision of network services also wholly disregards the fact that permitting a joint venture's members to remain in the venture and simultaneously

---

[2] We cite to the appendix to the *certiorari* petition filed by Visa U.S.A. Inc. in No. 03-1521 throughout this brief. We are filing this *amicus* brief in support of that petition and the petition of MasterCard in No. 03-1532, – both seeking review of the same court of appeals judgment.

team with a rival venture will often reduce, not increase, competition between the ventures. Here, the community banks, small businesses, and credit unions represented by *amici* are concerned that the court of appeals' ruling will diminish the competition among the card networks for their business, adversely affecting their ability to serve their customers.

C. The primary goal of the antitrust laws is to deter anticompetitive conduct that harms consumers. To achieve this end, the antitrust laws impose severe sanctions: treble damages in civil matters; fines and incarceration in criminal matters. As this Court has emphasized, however, "it is sometimes difficult to distinguish robust competition from conduct with long-run anti-competitive effects." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-768 (1984). Consequently, when antitrust rules are drawn too broadly or opaquely, companies concerned about "false condemnations" are deterred from engaging in conduct that enhances competition and benefits consumers. *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 124 S. Ct. 872, 882 (2004). The court of appeals' decision, unless overturned, will deter companies from investing in joint ventures and strategic alliances that benefit consumers; it will undermine, not advance, the purposes of the antitrust laws.

ARGUMENT

REVIEW IS WARRANTED BECAUSE THE COURT OF APPEALS' OPINION CONFLICTS WITH ANTITRUST RULINGS BY THIS COURT AND SEVERAL OTHER CIRCUITS REGARDING ANCILLARY RESTRAINTS AND WILL DETER INVESTMENT IN PROCOMPETITIVE JOINT VENTURES

In the last three decades, this Court has repeatedly emphasized that antitrust rules must be consistent with "the antitrust laws' traditional concern for consumer welfare and price competition." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 221

(1993). The court of appeals' decision ignores the teachings of this Court and other courts of appeals, and blurs the boundaries of antitrust law. The result is that any company participating in a joint venture or strategic alliance that may engage in business throughout the country now faces serious legal uncertainty in the Second Circuit, including the possibility of civil actions for treble damages. This uncertainty will deter companies from cooperating to create new ventures, products and services that enhance consumer welfare. The Court should grant review to resolve the conflict and uncertainty created by the decision below.

A. Joint Ventures Are An Increasingly Important Means Of Developing And Delivering New Products And Services In Today's Economy

Joint ventures and strategic alliances comprise a wide variety of business relationships in which two or more firms work together to engage in business activities, such as research and development, production, marketing, distribution, sales or purchasing. *E.g.*, U.S. Dep't of Justice & Federal Trade Comm'n, *Antitrust Guidelines for Collaborations Among Competitors* (2000) § 1.1, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,161. These collaborative arrangements, which often include firms that are actual or potential competitors of one another, are increasingly prevalent in today's global economy. Estimates suggest that more than 5000 joint ventures were launched worldwide in the last five years. *See* David Ernst, *Give Alliances Their Due*, McKinsey Quarterly, June 22, 2002, at 4. Moreover, joint ventures have grown in number by more than 20% per year over the past two decades, and the 100 largest joint ventures are now believed to account for more than $350 billion in combined annual revenue. *Ibid.*; James Bamford et al., *Launching a World-Class Joint Venture*, Harv. Bus. Rev., Feb. 2004, at 9.

Courts and commentators uniformly recognize that these business arrangements advance the goals of the antitrust laws by increasing output, enhancing efficiency

and improving consumer welfare. *See, e.g.*, Thomas Piraino, Jr., *Reconciling Competition and Cooperation: A New Antitrust Standard For Joint Ventures,* 35 Wm. & Mary L. Rev. 871, 873 (1994); *Collaboration Guidelines*, *supra*, § 2.1; *see also* Namgyoo K. Park et al., *A Resource-based View of Strategic Alliances and Firm Value in the Electronic Marketplace*, J. of Mgmt., Feb. 2004, at 7, 22. For instance, alliances and joint ventures often enable the partners to create new products that none of the partners could efficiently develop alone. *E.g.*, *BMI,* 441 U.S. at 21. Products such as Starbucks ice cream, the Geo Prizm automobile, the PowerPC and numerous vaccines and drug treatments have all been created through the use of joint ventures or similar collaborative arrangements. *See* Joseph Kattan, *Allocative Efficiency and the Rewards of Innovation*, 61 Antitrust L.J. 937, 940 (1993); Howard H. Chang et al., *Some Economic Principles for Guiding Antitrust Policy Towards Joint Ventures*, 1998 Colum. Bus. L. Rev. 223, 229-230 (1998).

Joint ventures also spur innovation and enable their participants to penetrate new markets, particularly in industries that are research and resource intensive. *See, e.g.*, Thomas Piraino, Jr., *Beyond Per Se, Rule of Reason or Merger Analysis: A New Antitrust Standard for Joint Ventures,* 76 Minn. L. Rev. 1, 8-9 (1991); Chang et al., *supra,* at 233. By spreading the risk associated with untested technologies that face uncertain demand and short life cycles for a product, joint ventures lower entry barriers that would otherwise prevent or discourage individual firms, particularly smaller firms, from pursuing new business endeavors or innovative activities. Kattan, *supra*, at 939-940; Robert Pitofsky, *A Framework for Antitrust Analysis of Joint Ventures*, 74 Geo. L.J. 1605, 1606-1607 (1986); Piraino, *Beyond Per Se*, *supra,* at 11-12. As the Senate Committee on the Judiciary has observed: "technological innovations and the profitable commercialization of those innovations are critical to the ability of the United States to raise Americans living standards and to compete in the world marketplace; [thus,] cooperative arrangements among nonaffiliated businesses in

the private sector are often essential to meet th[e]se goals." S. Rep. 103-51, at 8 (1993). In an increasingly global economy, "the case for collaboration is stronger than ever. It takes so much money to develop new products and to penetrate new markets that few companies can go it alone in every situation." Gary Hamel et al., *Collaborate with Your Competitors – and Win,* Harv. Bus. Rev., Jan.-Feb. 1989, at 133.

Participation in a joint venture also enables firms to lower their costs and generate significant efficiencies, benefits that are passed on to consumers in the form of lowe prices, improved quality, enhanced service, and new products. For instance, joint ventures "enable firms to attain economies of scale or scope that they could not otherwise achieve." Kattan, *supra,* at 938. Cost savings and efficiencies may also result from a broad range of collaborative activities, including (i) joint development and ownership of a single production facility; (ii) participation in an association that conducts joint advertising and marketing for its members; (iii) the pooling of complementary skills and assets; (iv) the sharing of information that facilitates decision-making; and (v) the setting of standards by industry trade groups to ensure that competing products interoperate with one another. Chang et al., *supra,* at 232; Kattan, *supra,* at 938. These efficiencies benefit consumers because they "reduce socially wasteful duplicative efforts," and enable existing competitors to compete more effectively. Chang, et al., *supra,* at 232; *Collaboration Guidelines, supra,* at § 3.36.

The courts have long recognized that "[c]ooperation is the basis of productivity. It is necessary for people to cooperate in some respects before they may compete in others, and cooperation facilitates efficient production." *Polk Bros., Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185, 188 (7th Cir. 1985) (Easterbrook, J.). In recent years, cooperation through joint ventures and strategic alliances has transformed the face of business – inspiring small business start-ups and growth, innovation, improving products, increasing efficiency, and creating jobs in a wide

range of industries. *See, e.g.*, Pete Collins, *Joint Ventures Providing High Traction for America's Fastest Growing Companies and the Economy*, PricewaterhouseCoopers Trendsetter Barometer Survey, Nov. 6, 2000 (Joint venture participants comprise almost one-third of the fastest growing companies and are projected to hire 29% more new employees, invest 85% more in capital and grow sales approximately 43% faster than non-participants during the year following the survey). The benefits to consumers, and the nation's economy, from joint ventures are substantial.

B. The Court Of Appeals' Ruling Is Inconsistent With This Court's Precedents And Conflicts With The Decisions Of Several Other Circuits Regarding The Lawfulness Of Ancillary Restraints In Joint Ventures

1. The court of appeals' ruling that joint venture loyalty rules are not presumptively lawful is inconsistent with the Court's *BMI* decision and contrary to rulings of the Seventh, Tenth, and D.C. Circuits

a. Since *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 23 (1979) (*BMI*), this Court and the lower courts have consistently recognized that joint ventures "hold the promise of increasing a firm's efficiency and enabling it to compete more effectively." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984). That is because when companies form new ventures or alliances, they not only contribute the assets and resources that will be devoted to the venture's business activity, but they also agree upon a set of rules that will govern their business relationships. Certain of these rules are called "ancillary restraints" in antitrust parlance, because they impose restrictions on the competitive behavior of the participants in the venture that are ancillary to the achievement of the venture's business objective. *United States v. Addyston Pipe & Steel Co.*, 85 F.

271, 281-282 (6th Cir. 1898) (Taft, J.), *aff'd*, 175 U.S. 211 (1899). For example, if a coffee company and an ice cream company form a joint venture to produce a new brand of coffee ice cream, each may contractually commit not to enter into a competing venture with another partner. That restraint on competition is ancillary to the achievement of the venturers' procompetitive objective of producing a new product, as it "contribute[s] to the success of a cooperative venture that promises greater productivity and output." *Polk Bros.*, 776 F.2d at 189.

The importance of ancillary restraints was recognized shortly after Congress enacted the Sherman Act. Then-Judge Taft, in his seminal opinion in *Addyston Pipe*, observed that at common law "[r]estrictions in the articles of partnership upon the business activity of the members, with a view of securing their entire effort in the common enterprise, were, of course, only ancillary to the main end of the union, and were to be encouraged." 85 F. at 280. This included loyalty rules – *i.e.*, restraints on the ability of joint venture partners "to do anything to interfere, by competition or otherwise, with the business of the [venture]." *Id.* at 281. He explained that if such restrictions were deemed unlawful, a partner in a joint venture could easily be deprived of "the enjoyment of the legitimate fruits" of the venture, or become the victim of the "unjust use of those fruits by the other party." *Id.* at 282. The threat of such injury, in turn, would discourage potential partners from investing in legitimate and productive joint ventures; thus, it is "for the benefit of the public at large that [these restraints] should be enforced." *Id.* at 281. For these reasons, Judge Taft concluded, an agreement that restrains competition between two parties is lawful under the antitrust laws so long as it "is merely ancillary to the main purpose of a lawful contract" between them and advances the purpose of that contract. *Id.* at 282.

Although antitrust analysis of ancillary restraints varied in the years following *Addyston Pipe*, a line of decisions beginning with this Court's opinion in *BMI*

"reformed the law of horizontal restraints" and clarified the boundaries of the ancillary restraints doctrine. *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 226 (D.C. Cir. 1986) (Bork, J.), *cert. denied*, 479 U.S. 1033 (1987). First, the Court held that joint ventures between competitors should not be evaluated under the *per se* rule simply because they diminish rivalry between the joint venture partners. *BMI*, 441 U.S. at 19-20. Rather, because joint ventures generally result in increased competition between the joint venture and other rivals, "such combinations are judged under [the] rule of reason." *Copperweld*, 467 U.S. at 768.[3]

Second, the Court held that when a venture imposes ancillary restraints that are reasonably related to the venture's purpose, those restraints are presumptively lawful and are also evaluated under the rule of reason. For example, in *BMI*, the Court held that an agreement among copyright holders in musical compositions to issue a single "blanket license" to their collective works at a fixed price was not a violation of the antitrust laws. 441 U.S. at 19-20. The venture itself was lawful because it provided an efficient means to license rights for "thousands of users, thousands of copyright owners, and millions of compositions." *Id.* at 20. And the ancillary fixed-price blanket license was also lawful because "a bulk license of some type is a necessary consequence of the integration necessary to achieve these efficiencies, and a necessary consequence of an aggregate license is that its price must be established." *Id.* at 21.

In *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 295 (1985), the Court extended this analysis to the most common form of ancillary restraints – those governing the ongoing competitive

[3] A sham joint venture – *i.e.*, one that holds no promise for increasing competition or economic efficiency, but is simply a cloak for engaging in price fixing – may be evaluated under the *per se* rule. *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982).

relationships among joint venture partners. The Court rejected the argument that a cooperative's decision to expel a member, and thereby deprive that member of the cost savings enjoyed by its competitors who remained members of the cooperative which purchased products that all of them used in their otherwise competing businesses, was a *per se* unlawful group boycott. Instead, the Court found that "[w]holesale purchasing cooperatives . . . are not a form of concerted activity characteristically likely to result in predominantly anticompetitive effects. Rather, such cooperative arrangements would seem to be 'designed to increase economic efficiency and render markets more, rather than less, competitive.'" *Id.* at 295 (quoting *BMI*, 441 U.S. at 20). The Court further found, with respect to the cooperative's ancillary restraints, that a joint venture "must establish and enforce reasonable rules in order to function effectively." *Id.* at 296.

b. Following this explication by the Court of the ancillary restraints doctrine, the courts of appeals have repeatedly found loyalty rules to be ancillary and lawful. The reason, as the Seventh Circuit explained in *Polk Bros.*, is that "[t]he war of all against all is not a good model for any economy. Antitrust law is designed to ensure an appropriate blend of cooperation and competition, not to require all economic actors to compete full tilt at every moment." *Polk Bros.*, 776 F.2d at 188. The joint venture before the Seventh Circuit was one between two retailers to build a large facility that would house both stores. As part of this agreement, the retailers entered into a covenant not to sell products in competition with each other. Citing this Court's decisions in *BMI* and *National Collegiate Athletic Association v. Board of Regents*, 468 U.S. 85, 114 (1984), the Seventh Circuit held that the agreement of the partners not to compete against each other was lawful because it was ancillary to the parties' joint venture. Specifically, the loyalty rule "contribute[d] to the success of a cooperative joint venture that promise[d] greater productivity and output" by preventing either partner from

"tak[ing] a free ride on [the] efforts" of the other to attract customers to their common location. *Id.* at 189-190.

The D.C. Circuit likewise followed this Court's precedents to uphold in *Rothery* a joint venture loyalty rule similar to the one at issue in this case. *Rothery* involved an antitrust claim against Atlas Van Lines which was a joint venture of competing trucking firms who collectively offered their services under the Atlas brand. The joint venture agreement barred the participating trucking firms "from dealing with any other [van] line," and Atlas adopted a policy of expelling any trucking firm that used Atlas facilities or services to compete with Atlas for customers. *Id.* at 211, 213. Judge Bork observed for the court that these restraints were designed to solve the "free rider" problem – *i.e.*, "a serious problem for a partnership or joint venture" that "occurs when one party to an arrangement reaps benefits for which another party pays." *Id.* at 212. Citing *Addyston Pipe* and this Court's decisions in *BMI*, *NCAA* and *Northwest Wholesale Stationers*, the D.C. Circuit held that Atlas' loyalty rules were ancillary and lawful because "they enhance the efficiency of that union by eliminating the problem of the free ride." *Id.* at 224.

In a case that is substantively indistinguishable from the present case, the Tenth Circuit applied this Court's teachings to uphold a loyalty rule that prohibits competing card systems from joining the Visa network. *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958 (10th Cir. 1994), *cert. denied*, 515 U.S. 1152 (1995). That rule is, in essence, the mirror image of the rule at issue in the present case, and is directed toward the same end – *i.e.*, to "protect[] the property [Visa] has created over the years and prevent[] [Discover] and American Express, successful rivals, from profiting by a free ride." *Id.* at 970. Citing *BMI*, *NCAA*, *Northwest Wholesale Stationers* and *Rothery*, the Tenth Circuit held that the rule was ancillary to Visa's overall purpose and lawful: "To impose liability on Visa USA for refusing to admit [Discover] or revise the bylaw to open its membership to intersystem rivals, we think, sucks the

judiciary into an economic riptide of contrived market forces." *Id.* at 972.

In short, since this Court's decision in *BMI*, courts and commentators have uniformly agreed that ancillary restraints generally, and joint venture loyalty rules in particular, carry "a presumption of lawfulness." XI Hovenkamp, *Antitrust Law* ¶ 1904 (1998).

c. The court of appeals' decision in the instant case is in direct conflict with these decisions of this Court and the Seventh, Tenth, and D.C. Circuits. Although the court below purported to apply the ancillary restraints doctrine (Visa Pet. App. 12a-13a), it concluded that an ancillary restraint in which each joint venture partner "agree[s] not to compete with the others in a manner which the consortium considers harmful to its combined interests" is "[f]ar from being 'presumptively legal.'" *Id.* at 20a. On the contrary, the court held, it is an "exemplar[ ] of the type of anticompetitive behavior prohibited by the Sherman Act." *Ibid.* The court did not discuss this Court's rulings in *BMI* or *Northwest Wholesale Stationers*, nor did it discuss, much less distinguish, the several opinions of the other courts of appeals that have upheld comparable loyalty rules.

To support its contrary conclusion, the court below pointed to the Court's decision in *NCAA*, 468 U.S. at 114, which found unlawful, under the rule of reason, the restraints the NCAA imposed on the number of college football games that could be broadcast on television and the establishment of fixed prices for categories of games. The Court reasoned that those restraints reduced competition in the sale of television rights to college football games and were not necessary to the legitimate objectives of the NCAA. *Ibid.* The Court observed, however, that its conclusion might have been different "[i]f the NCAA faced 'interbrand' competition" from other providers of college football games. *Id.* at 115 n.55. Here, the court of appeals acknowledges that Visa and MasterCard face significant "interbrand" competition from other card networks,

including American Express and Discover, which the court of appeals found were the largest and fifth largest card issuers in the United States respectively, measured by transaction volume. Visa Pet. App. 10a.

Moreover, the restraint at issue in *NCAA* was an express restriction on the quantities sold, and the prices charged, by the joint venture members – the type of restraint that may have a direct impact on consumer welfare. In the instant case, there are no such restraints. Visa and MasterCard's members are free to issue as many cards as they like, on whatever price and terms they choose. Visa Pet. App. 10a. Indeed, the court of appeals found that competition "among (and within)" the four network providers is "robust," with 20,000 separate card issuers competing for customers. *Id.* at 16a.

Thus, the court of appeals' opinion ignores and conflicts with the teachings of this Court and the other courts of appeals, including the rationale of the very case law on which it relies. The ruling consequently creates serious uncertainty as to the standards that businesses operating nationwide will be subjected to when the Second Circuit and the lower courts within its jurisdiction evaluate the lawfulness of the most common, and arguably most important, form of ancillary restraint in joint ventures – the requirement that joint venture partners be loyal to each other.

2. The court of appeals' equating of injury to rivals with injury to competition is contrary to the longstanding rule of this Court

a. The court of appeals' decision also conflicts with decisions of this Court and the other courts of appeals holding that an antitrust plaintiff cannot prevail unless it shows harm to competition – *i.e.*, an adverse effect on the price or quantity of goods available in a market. *E.g.*, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487 (1977) ("[t]he antitrust laws . . . were enacted for 'the protection of competition, not competitors' "). The reason

for this requirement is that "Congress designed the Sherman Act as a consumer welfare prescription." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (citation omitted).

Thus, business conduct that may simply harm the business opportunities of a competitor, such as the loyalty rule at issue here, is not prohibited by the antitrust laws. This is because business conduct that benefits consumers – *i.e.*, that lowers prices and increases efficiency – almost always hurts one or more competitors: "For instance, an efficient firm may capture unsatisfied customers from an inefficient rival, whose own ability to compete may suffer as a result. This is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster." *Copperweld*, 467 U.S. at 767. Indeed, if the courts were to permit injury that competitors suffer as a result of aggressive competition to form the basis of antitrust actions, it would defeat the purpose of the those laws. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 342 (1990). "The antitrust laws require no such perverse result." *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 116 (1986).

b. The court of appeals' decision, however, yields precisely this perverse result. Although the court acknowledges that there must be harm to competition to justify the finding of an antitrust violation, it loses sight of that fact, confusing harm to a competitor with harm to competition.

In the court of appeals' view, harm to competition can be established by showing that a competitor cannot team with individual partners in a joint venture to offer products that will compete with the venture's products. Visa Pet. App. 21a (absent the loyalty rules, "certain types of products combining unique features of cards offered by Amex and Discover with the advantages of linkage to cardholders' bank accounts would likely become available.") Although a competitor's inability to offer a specific type of product without the help of one of the partners in a rival joint venture may establish harm to that competitor, it does not establish harm to competition, particularly in a

market where there are many other product offerings. As the Seventh Circuit has explained: "The exclusion of one or even several competitors, for a short time or even a long time, is not ipso facto unreasonable. The welfare of a particular competitor who may be hurt as the result of some trade practice is the concern not of the federal antitrust laws." *Roland Machinery Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 394 (7th Cir. 1984) (Posner, J.). Rather, "the exclusion of competitors is cause for antitrust concern only if it impairs the health of the competitive process itself." *Ibid.*

In this case, the court of appeals found that Visa and MasterCard face strong competition from rivals American Express and Discover, and that competition at the consumer level is "robust," with more than 20,000 companies offering different types of cards. Pet. App. 16a, 19a.

c. The court of appeals' finding that the loyalty rule resulted in harm to competition in the provision of "network services" to Visa and MasterCard's members is equally perverse. The "consumers" in such a market are the Visa and MasterCard members, including many members of *amici* ICBA and CSCU. Any bank or credit union with whom American Express or Discover wants to partner, can do so if it prefers to join those networks instead of MasterCard or Visa. The fact that banks and credit unions have not joined a different card network does not mean, as the court of appeals suggested (Visa Pet. App. 16a, 21a), that MasterCard and Visa face no competition from other card networks. Indeed, the court of appeals found that MasterCard and Visa "pay millions of dollars in incentive payments in the form of discounts from the price for network services to selected banks to compete for their business" (Visa Pet. App. 16a-17a), and that American Express is the largest card issuer in the United States measured by transaction volume. *Id.* at 10a.

The court of appeals wholly disregards the fact that permitting a joint venture's members to remain in the venture and simultaneously team with a rival venture will often reduce, not increase, competition between the

ventures. *See, e.g.*, *Rothery*, 792 F.2d at 221; *Addyston Pipe*, 85 F. at 381. For example, *amicus* SBSC is concerned that the court's ruling will lead to small businesses paying higher fees to American Express because of diminished competition between the card networks, as American Express's Chairman and CEO has suggested (MasterCard Pet. 7 (quoting C.A. E.R. E-1709)).

Likewise, *amicus* ICBA repeatedly warned that the government's suit in this case, if successful, "would leave community banks less competitive with larger banks and lead to the degradation of Visa and MasterCard acceptance." *Small Banks Fear Visa Suit Hurts Them The Most*, Bank Network News, May 12, 1999, LEXIS, News Library, ARCNWS File. That is because elimination of the loyalty rules would allow some competitors to "free ride" on the investments made by ICBA members and other banks in the development and maintenance of the Visa and MasterCard networks:

> American Express has one strategy in mind: cherry pick select banks to maintain its traditional profile of the high-spending consumer, and continue to attract merchants to pay higher fees by assuring that Amex card holders will spend more * * * If American Express is allowed to pick and choose which banks it wants as partners - as it has said it would - thousands of community banks and their customers will be at a disadvantage. Why? Because allowing American Express to target select members of MasterCard's and Visa's open associations, and funnel high-end transactions to its closed network, will undermine these associations' ability to support the thousands of community banks in the future.

Letter to the Editor from Kenneth Guenther, President and Executive Director, ICBA, American Banker, Oct. 26, 2001, at 11.

This Court has recognized that restraints designed to ensure that such "free-riders" do not interfere with the

efficient provision of products and services are not only reasonable, but necessary to the achievement of the antitrust laws' goals. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 762-763 (1984). *See also Continental T.V. Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 55 (1977). And, beginning with *Addyston Pipe*, courts and commentators have consistently recognized that joint venture loyalty rules lawfully "can prevent venture participants from free riding on the joint venture by gaining access to intellectual property, promotional facilities, or distribution networks through the collaborative efforts of the joint venture and using these advantages in competition with the joint venture." Kattan, *supra*, at 960 n.108. *See also Rothery*, 792 F.2d at 221; *Polk Bros.*, 776 F.2d at 190; *Addyston Pipe*, 85 F. at 282.

The court of appeals' decision to open the courthouse door to claims that loyalty restrictions violate the antitrust laws whenever they limit a competitor's ability to free-ride on the work and investment of a joint venture conflicts with these opinions of the Court and the other circuits, and creates significant legal uncertainty for participants in joint ventures.

C. The Court Of Appeals' Ruling Will Deter Investment In Procompetitive Joint Ventures And Diminish Competition, In Contravention Of The Purpose Of The Antitrust Laws

A primary goal of the antitrust laws is to deter anti-competitive conduct that harms consumers. To achieve this end, the antitrust laws impose severe sanctions: treble damages in civil matters; fines and incarceration in criminal matters. As this Court has emphasized, however, "it is sometimes difficult to distinguish robust competition from conduct with long-run anti-competitive effects." *Copperweld*, 467 U.S. at 767-768. Both types of conduct are likely to result in injury to individual competitors in the fierce battle for marketplace supremacy. *Id.* at 768. Consequently, when antitrust rules are drawn too broadly

or opaquely, the resulting uncertainty imposes significant costs on our economy: companies concerned about "false condemnations" under the antitrust laws are deterred from engaging in conduct that enhances competition and benefits consumers. *Verizon Communications Inc.*, 124 S. Ct. at 882 (overbroad rules "are especially costly because they chill the very conduct the antitrust laws are designed to protect").

The court of appeals' decision, unless overturned, will deter companies from entering into joint ventures and strategic alliances that benefit consumers. This Court has recognized that where "market imperfections such as the so-called 'free rider' effect" exist, "[certain] services might not be provided . . . in a purely competitive situation." *GTE Sylvania*, 433 U.S. at 55. In the joint venture context, loyalty rules solve the free-rider problem, and thus encourage parties to enter into those arrangements. Judge Taft recognized this in *Addyston Pipe*, observing that ancillary restraints, such as loyalty rules, are generally lawful because they "offer[] an encouragement to trade" that benefits "the public at large." 85 F. at 281 (quoting *Mallan v. May*, 152 Eng. Rep. 967, 972 (Ex. D. 1843)). A century later, the Seventh Circuit reached the same conclusion: "A legal rule that enforces covenants not to compete . . . makes it easier for people to cooperate productively in the first place." *Polk Bros.*, 776 F.2d at 189. In *Polk Bros.*, the joint venture's loyalty rule "played an important role in inducing the two retailers to cooperate." *Id.* at 190. The court of appeals' decision, by creating significant uncertainty as to the lawfulness of loyalty rules, discourages the development of new joint ventures.

The threat from the court of appeals decision in this case extends to investment in existing joint ventures as well. If loyalty rules are regarded as presumptively unlawful and can be successfully challenged on a showing that they prevent a rival from teaming with a joint venture partner to compete against the venture itself, existing joint venture partners will have less incentive to invest in

their cooperative activities. In *Rothery*, Judge Bork observed that without Atlas' loyalty rule, "the van line's incentive to spend for reputation, equipment, facilities, and services declines as it receives less benefit from them. That produces a deterioration of the system's efficiency. . . . In the extreme case, the system as a whole could collapse." 792 F.2d at 221.

Amicus ICBA expressed the same concern about the courts' rulings in this case: "American Express wants to weaken MasterCard and Visa – a payment system railroad which community banks helped build and on which they and their customers depend. * * * [A]llowing American Express to target select members of MasterCard's and Visa's open associations . . . will undermine these associations' ability to support the thousands of community banks in the future." Letter to the Editor from Kenneth Guenther, *supra*, at 11. Unless reversed, the court of appeals' opinion will reduce investment in productive joint venture activities, and deter the development of new ventures; it will undermine, not advance, the purposes of the antitrust laws.

CONCLUSION

For the reasons set forth above and in the petitions for writ of *certiorari*, the petitions should be granted.

Respectfully submitted,

DREW S. DAYS, III
Counsel of Record
W. STEPHEN SMITH
BETH S. BRINKMANN
JONATHAN S. GOWDY
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-1500

Attorneys for Amici Curiae

August 13, 2004